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In The

Supreme Court of the United States

October Term, 1962

No. 217

JOSEPHINE GOSS, ET AL.,
Petitioners,

v.

THE BOARD OF EDUCATION OF THE CITY OF KNOXVILLE, TENNESSEE, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF AMICUS CURIAE

By written consent of the parties in the cause, the Board of Education of the Memphis City Schools files this brief as amicus curiae.

INTEREST OF THE AMICUS CURIAE

The amicus curiae, Board of Education of the Memphis City Schools, has an interest in

this case in that the Memphis school system is operated under a plan of desegregation on file with the United States District Court for the Western District of Tennessee. This plan is attached hereto as Appendix A. Under the plan unitary non-racial school zone lines have been established and every student, regardless of race, is assigned to the school serving the zone of his residence. The Plan then contains the following provision:

> "The pupil assignment law and Board of Education policies and regulations will govern pupil assignments and transfer applications but the following factors will be regarded as some of the valid conditions that may be considered to support applications for transfer:
>
> A. When a white student would otherwise be required to attend a school previously serving colored students only.
>
> B. When a colored student would otherwise be required to attend a school previously serving white students only.
>
> C. When a student would otherwise be required to attend a school where the majority of students in that school or in his or her grade are of a different race."

This provision was first approved by the Sixth Circuit in **Kelly v. Nashville** (1959) 270 F. (2d) 209, cert. den., 361 U. S. 924, and has been included in the Plans of Desegregation of every major school system in Tennessee. The operation of the Memphis school system's plan of desegregation is similar in many respects to the plans involved in the two cases in which the Court has granted certiorari. Therefore, the decision in this case will materially affect the implementation of the Plan of Desegregation of the Memphis City Schools.

SUMMARY OF ARGUMENT

I.

The Fourteenth Amendment protects the freedom of the individual and prohibits a State from depriving the individual of life, liberty or property without due process of law; or from denying to the individual the equal protection of the law.

Under plans of desegregation in Tennessee, Boards of Education have established unitary non-racial school zone lines and students are assigned to the school serving their zone without regard to race or color. After making a non-racial school zone assignment, the school

systems' plans of desegregation recognize the rights of parents of students in a racial minority to apply for a transfer out of the school to which the student has been assigned. The enrollment of the school to which transfer is sought may be a bi-racial one, or one attended by members of another race, or one attended by members of the race of the pupil seeking the transfer.

Boards of Education **may**, and we emphasize the term may, either grant the transfer application or reject it. This determination shall be based upon the parents' wish, existing school facilities and other educational factors not related to race.

For reasons which will be more fully explained in the Argument, we respectfully suggest that the granting of a right to a parent to petition for a transfer on the ground that his child is in a racial minority is not state action which is condemned by the Fourteenth Amendment.

II.

If this Court should determine that it is a violation of the Fourteenth Amendment for school boards to expressly permit parents to voice this desire to transfer their children for

racial reasons, then we respectfully request that the Court under its equitable powers recognized in the second Brown decision, 349 U. S., 294, approve this provision in plans of desegregation during the transition to a racially non-discriminatory school system.

ARGUMENT

I. The Fourteenth Amendment Condemns State Action.

The Fourteenth Amendment to the Constitution is directed not at individual action but only at action of a state through one of its agencies such as a board of education. In **Cooper v. Aaron,** 358 U. S. 1, 3 L. Ed. (2d) 5, 78 S. Ct. 401, this Court stated:

> "The controlling legal principles are plain. **The command of the Fourteenth Amendment is that no 'State' shall deny to any person within its jurisdiction the equal protection of the laws.** 'A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person with-

in its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government . . . denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning.' Ex parte Virginia, 100 U. S. 339, 347, 25 L. Ed. 676, 679. Thus the prohibitions of the Fourteenth Amendment extend to all action of the State denying equal protection of the laws; whatever the agency of the State taking the action, see Virginia v. Rives, 100 U. S. 313, 25 L. Ed. 667; Pennsylvania v. Board of Directors of City Trusts of Phila. 353 U. S. 230, 1 L. Ed. 2d 792, 77 S. Ct. 806; Shelley v. Kraemer, 334 U. S. 1, 92 L. Ed. 1161, 68 S. Ct. 836, 3 A.L.R. 2d 441, or whatever the guise in which it is taken, see Derrington v. Plummer (CA5 Tex.) 240 F. 2d 922; Department of Conservation & Development v. Tate (CA4 Va.) 231 F. 2d 615."

The recognition in Cooper of the rule that the Fourteenth Amendment is directed only at action of the state is a reaffirmation of the law enunciated in earlier decisions of this

Court. For example, in the Civil Rights cases, 109 U. S. 3, 27 L. Ed. 835, it was said:

> "The 1st section of the 14th Amendment, which is the one relied on, after declaring who shall be citizens of the United States, and of the several States, is prohibitory in its character, and prohibitory upon the States. It declares that
>
> > 'No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.'
>
> **It is state action of a particular character that is prohibited.** Individual invasion of individual rights is not the subject-matter of the Amendment. It has a deeper and broader scope. It nullifies and makes void all state legislation, and state action of every kind, which impairs the privileges and immunities of citizens of the United States, or which injures them in life, liberty or property without due process of law, or which denies to any of them the equal protection of the laws. It not only does this,

but, in order that the national will, thus declared, may not be a mere **brutum fulmen**, the last section of the Amendment invests Congress with power to enforce it by appropriate legislation, To enforce what? To enforce the prohibition. To adopt appropriate legislation for correcting the effects of such prohibited state laws and state Acts, and thus to render them effectually null, void and innocuous. This is the legislative power conferred upon Congress, and this is the whole of it. It does not invest Congress with power to legislate upon subjects which are within the domain of state legislation; but to provide modes of relief against state legislation or state action, of the kind referred to. It does not authorize Congress to create a code of municipal law for the regulation of private rights; but to provide modes of redress against the operation of state laws, and the action of state officers executive or judicial, when these are subversive of the fundamental rights specified in the Amendment. Positive rights and privileges are undoubtedly secured by the 14th Amendment; but they are secured by way of prohibition against state laws and state proceedings affecting those rights and privileges, and by power given to Congress to legislate for the purpose of carry-

ing such prohibition into effect; and such legislation must, necessarily, be predicated upon such supposed state laws or state proceedings, and be directed to the correction of their operation and effect. A quite full discussion of this aspect of the Amendment may be found in U. S. v. Cruikshank, 92 U. S., 542 (XXIII, 588); Va. v. Rives, 100 U. S. 313 (XXV, 667), and Ex Parte Va., 100 U. S., 339 (XXV, 676)

. . . . . .

And so in the present case, until some state law has been passed or some state action through its officers or agent has been taken, adverse to the rights of citizens sought to be protected by the 14th Amendment, no legislation of the United States under said Amendment, nor any proceeding under such legislation, can be called into activity; for the prohibition of the Amendment are against state laws and acts done under state authority. Of course, legislation may and should be provided in advance to meet the exigency when it arises; but it should be adapted to the mischief and wrong which the Amendment was intended to provide against; and that is, state laws, or state actions of some kind, adverse to the rights of the citizen secured by the Amend-

ment. Such legislation cannot properly cover the whole domain of rights appertaining to life, liberty and property, defining them and providing for their vindication. That would be to establish a code of municipal law regulative of all private rights between man and man in society. It would be to make Congress take the place of the State Legislatures and to supersede them. It is absurd to affirm that, because the rights of life, liberty and property, which include all civil rights that men have, are, by the Amendment, sought to be protected against invasion on the part of the State without due process of law, Congress may, therefore, provide due process of law for their vindication in every case; and that, because the denial by a State to any persons, of the equal protection of the laws, is prohibited protection. In fine, the legislation which Congress is authorized to adopt in this behalf is not general legislation upon the rights of the citizen, but corrective legislation, that is, such as may be necessary and proper for counteracting such laws as the States may adopt or enforce, and which, by the Amendment, they are prohibited from making or enforcing, or such acts and proceedings as the States may commit or take, and which, by the

> Amendment, they are prohibited from commiting or taking. It is not necessary for us to state, if we could, what legislation would be proper for Congress to adopt. It is sufficient for us to examine whether the law in question is of that character."
> 109 U. S. at Page 11.

We see then that before the Court should condemn a part of a plan of desegregation on the ground that it contravenes the Fourteenth Amendment, it must be determined that the state has compelled certain action. The Fourteenth Amendment does not condemn the free and voluntary action of an individual. If an individual, having been extended the opportunity to attend a desegregated school and, in fact, having been assigned to that school by the state, exercises his own choice not to attend that desegregated school, such action is action of the individual, not the state. The relation of the Fourteenth Amendment to individual action is well stated in **U. S. v. Harris**, 106 U. S. 629, 27 L. Ed. 290, where it was held:

> "The purpose and effect of the two sections of the 14th Amendment above quoted were clearly defined by Mr. Justice Bradley in the case of U. S. v. Cruikshank, 1 Woods, 316, as follows:

'It is a guaranty of protection against the acts of the State Government itself. It is a guaranty against the exertion of arbitrary and tyrannical power of Congress, whether express or implied, to legislate for the enforcement of such a guaranty does not extend to the passage of laws for the suppression of crime within the States. The enforcement of the guaranty does not require nor authorize Congress to perform.' The duty that the guaranty itself supposes it to be the duty of the State to perform and which it requires the State to perform."

. . . . . .

"So in Virginia v. Rives, 100 U. S., 313 (XXV, 667) it was declared by this court speaking through Mr. Justice Strong, that

'These provisions of the 14th Amendment have reference to state action exclusively and not to any action of private individuals.'

These authorities show conclusively that the legislation under consideration finds no warrant for its enactment in the 14th Amendment.

The language of the Amendment does not leave this subject in doubt. When the State

has been guilty of no violation of its provisions; when it has not made or enforced any law abridging the privileges or immunities of citizens of the United States; when no one of its department has deprived any person of life, liberty or property, without due process of law, nor denied to any person within its jurisdiction the equal protection of the laws; when, on the contrary, the laws of the State, as enacted by its legislative and construed by its judicial and administered by its executive departments, recognize and protect the rights of all persons, the Amendment imposes no duty and confers no power upon Congress."
106 U. S. at P. 638.

The position of this amicus curiae may be stated thusly:

The Fourteenth Amendment would seem to compel school boards to consider within lawful limits the wish of a parent as to the school which his child should attend. The Fourteenth Amendment was adopted to protect the freedom of every individual and that freedom should include the freedom of a parent to express a preference that his child attend a school with a majority of the members of his own race. So long as the

state does not compel attendance at a segregated school and has extended to a student the right to attend a desegregated school the state should be entitled to receive and, where possible, to act upon the expressed desire of a parent. This Court should support this freedom to the same extent and for the same reasons that it condemns state action compelling a student to attend a segregated school.

2. Not State Action But Personal Freedom.

The case at bar points out graphically the operation of that phase of the plan of desegregation which petitioners seek to have declared unconstitutional. This record shows that in establishing unitary non-racial school zone lines in Davidson County, 405 Negro children were in zones of the 62 elementary schools that had previously been attended by white students. (R. 194, 252). The briefs of petitioners and the Solicitor General point out that the parents of 51 children, or twelve (12%) per cent of the 405 Negro children involved, exercised their right to attend a desegregated school. It results, therefore, that the parents of 354 Negro children expressed a preference that their children attend a school with members of their own race. This prefer-

ence was the free choice of the parents, unfettered by state compulsion.

The desires of the parents of those 354 children presents directly the question which this Court must answer. How should boards of education in Tennessee treat the expressions of the parents of these children? What should happen to these 354 children? Shall they be compelled to attend school with members of another race? Shall the Davidson County Board of Education be compelled to make these 354 children, or even one of these children, attend a desegregated school when neither the parents nor the child desire that? Have we now reached the point where the state must compel the integration of these pupils?

A recent study entitled "The Drop-Outs" by Lichter, Rapien, Seibert and Sklansky (McMillan Co., 1962) points out the tremendous problem with which boards of education are confronted in trying to persuade students to complete their education. This publication shows that as many as 70% of the youth in the 16 to 20 age bracket in certain large urban areas will be neither attending school nor employed. At page 59 of this report it is stated that the drop-out rate among Negro students

is higher than among other students. If those Negro children are compelled to attend a desegregated school, what is the drop-out rate going to be? Are they going to complete their high school education and go on to become useful citizens of the United States, their state and their community, or will they end their education at the sixth or seventh grade?

Is there constitutional prohibition against giving the parents of the child the right to say: "I don't want my child to attend a biracial school. I am proud of my race and I prefer that the school board, if it is possible, assign my child to a school attended by a majority of the members of my own race"? Is a state guilty of violating the Fourteenth Amendment when it permits its citizens to express a preference as to the school which their children shall attend and accedes to that request consistent with available facilities and other factors related solely to education?

3. Petitioners Seek Compulsory Integration.

A. Perspective.

Frequently, in cases such as this, a Court is asked to render a decision in a vacuum. By this statement we mean that if this case follows the general pattern, neither the Goss

child, the named plaintiff in the suit, nor any of the remaining plaintiffs are pressing for a determination of the constitutional invalidity sought by petitioners. Instead, a serious and important constitutional issue is presented to the Court by the National Association for the Advancement of Colored People. This issue involves the substantial rights, not only of boards of education, but even more important, the rights of parents who desire the privilege of expressing to their board of education an objection to compelling their children to attend a desegregated school in which their race is in the minority. It is the Association's position that boards of education should be forbidden to act upon the expression of the parents' will.

We do not intend that these remarks should be construed as criticism of the Association. It has every right to attack unconstitutional action of school boards or any branch of state and local government. By the same token, boards of education have the right to defend the operation of the school system so that every student may receive the best possible education unhampered by social pressures. Because of the scope of the Association's activities and the success with which its efforts have been met it is often easy to accept the

basic principle which the Association espouses while losing sight of the effect which that principle might have on people and, in fact, the very people whose cause the Association so fervently and capably advocates.

To at least partially fill this vacuum and put this case in perspective, we feel that the Court should be apprised of the background of this litigation and what we consider to be the motivating factor for petitioners' objection to this provision in a plan of desegregation.

It is a matter of common knowledge as demonstrated by the preferences expressed by Negro parents in Davidson County that the National Association for the Advancement of Colored People has experienced considerable difficulty in its efforts to persuade a considerable majority of Negro citizens to enroll their children in desegregated schools. The reasons for this difficulty are vague and obscure. We are confident that the Association attributes this apathy to fear of reprisal but the very fact that 255,367 Negro students attended bi-racial schools would indicate that fear is of little significance.

On the other hand there are those who say that this desire not to attend a school in which

members of one's race or religion or national origin are in the minority flows from normal human characteristics and desires. The fact that racial reasons, rather than reasons based upon other considertions, create in an individual the desire for the right to petition a board of education not to assign the child to a desegregated school should be of no consequence so long as the State does nothing to compel the parent to act but only listens to the parents' petition and entertains that petition where possible.

At this juncture it would be pertinent to reply to the Solicitor General's implied criticism of the slow pace at which desegregation is proceeding. He rests this implication on certain statistics showing that "255,367 of the 3,279,431 Negroes of school age living in the southern and border states", or 7.8 per cent, have come to attend bi-racial schools. This comparison is completely meaningless. Almost uniformly in Tennessee and throughout the United States, a child's eligibility to attend a particular school is governed by that child's place of residence as related to his school zone. Members of a particular race or national origin tend to settle in well defined neighborhoods and schools have been built to serve those neighborhoods. Because of this

fact the overwhelming majority of Negro students live in a school zone serving only members of their own race.

Though no accurate statistics are available, this Court knows from its own observation of conditions in every large urban area that considerably less than 1 person in 4 live in a racially mixed neighborhood. It would be safe to assume, therefore, that of the 3,279,431 Negro students in southern and border states, less than 1,000,000 of them would normally be assigned to a desegregated school. It results that more than 25 per cent of those children who are eligible are now attending desegregated schools. Considering customs that have existed for literally centuries, this is a remarkable result that has been achieved since this Court's decision in the Second Brown Case, 349 U. S. 294, a period of less than eight years.

The Solicitor General states at page 3 of his Brief " . . . To some, this represents great progress in bringing about changes in deep-rooted social patterns; to others, the pace has been too slow . . . " Regardless of one's attitude, the fact remains that boards of education have no control over neighborhood racial patterns. All that school boards can do is draft unitary non-racial school zone lines and

assign children to schools upon the basis of those lines without regard to the race of the student.

The pace at which Tennessee has desegregated its public schools, under desegregation plans containing the provision which petitioners attack, may be found in the United States Civil Rights Commission report styled "Civil Rights U.S.A., Public Schools Southern States 1962" at page 107-132.

B. Practical Operation

Let us assume that petitioners are successful in this litigation. Let us assume that the Court decides that a provision in a plan of desegregation permitting a parent to make a successful application for transfer because his child is in a racial minority is that type of state action which contravenes the Fourteenth Amendment. The first and obvious result of this decision will be that boards of education are denied the right to consider the parents' wishes if those wishes are based upon the race of their children. But what is the effect of such a decision?

Though an answer to this question might be furnished by reference to the 405 Negro students in Davidson County, we respectfully

suggest that the experience in Nashville, Tennessee, is much better and more impartially documented, and with the Court's permission we would like to refer to the practical operation of that system's plan of desegregation. A further reason for referring to the experience in Nashville is the fact that it was one of the first communities in the United States to formulate a plan of desegregation and its plan, including the minority transfer provision, has been a guidepost from both a practical and legal standpoint, i. e., all of the school systems presently before the Court have adopted the Nashville plan almost verbatim. Kelly v. Nashville, (1959, 6 Cir.), 270 F. 2d 209.

The operation of the Nashville Plan is discussed at length in Civil Rights U. S. A., Southern Schools, 1962, page 115, et seq. Under this plan each student is assigned to a school upon the basis of unitary non-racial school zone lines. In the event a Negro student is assigned to a desegregated school, he must attend that school, unless his parents make written request to transfer to a school attended by members of his own race.

After three years of operation of the Nashville plan 87 per cent of the Negro students sought transfers out of desegregated

schools and in the fourth year, i.e., 1961-1962 it was estimated that only 20 percent would remain in desegregated schools; thus, 80 per cent of the students would seek transfers out of those schools. The reasons assigned by the parents for those transfers are many and varied but only the most naive would attribute reasons other than race to the great majority of these applications. How then shall boards of education in Tennessee handle these transfer applications?

Petitioners, apparently recognizing the incongruity of their position in this cause, suggest that we become a blind Solomon and grant these transfers, or perhaps only a few of them, "based on individual hardships and other educationally acceptable standards unrelated to preservation of the segregation system." (Petitioners' Brief, page 21, 22). In other words, ignore the truth, and fictionalize a ground for transfer other than race.

While petitioners furnish us with rather broad standards to disguise the same objective, i.e., to accede to a parent's request that his child attend a school in which his members are in a racial majority, the Solicitor General furnishes us with five specific standards which he artfully describes as "'Tested Methods". (Brief, page 37, et seq.)

It is remarkable that petitioners and the Solicitor General not only recognize the problem but go even further and furnish a variety of solutions. The only difficulty is that the solutions which they furnish are totally lacking in candor. Who but a parent can determine the intimate effect of this characteristic which we term "race"? Would it not be challenged as unconstitutional if a board of education say that a child's race constitutes "... an individual hardship (or) other educationally accepted standard unrelated to the segregation system" as petitioners suggest?

The solutions suggested by the Solicitor General range from abandonment of the educational theory of neighborhood schools, to "Gerrymandering", to more patent subterfuge. In support of this statement we refer to the fifth "Tested Method" which states that "any educational problems, psychological or otherwise, resulting from requiring children of one race to attend a school largely composed of children of another race may be handled by a transfer provision not based on racial criteria". It is difficult to see what criteria other than race a board of education could assign to support its action since the educational problem results from race because the child is required to attend a school

largely composed of children of another race.

With all due deference to these suggestions we respectfully submit that more, not less, candor should be expected from school authorities. The Civil Rights Commission has characterized the conduct of this Memphis Board of Education in the desegregation field by using the term "good faith". To be less than candid might well be expedient but it would be out of character and detrimental to the relation which this board has attempted to establish with some degree of success with members of both races.

Let us proceed now to a consideration of the Board's position in this difficult situation. It receives a transfer application from one of the 405 Davidson County parents and it grants that application. The parent is satisfied and the child is satisfied. Their constitutional right to attend a desegregated school has been accorded to them and rejected.

But, unfortunately, the case does not end there. The National Association for the Advancement of Colored People learns of the transfer. The Association learns that the board has acceded to the wishes of one of its patrons and transferred his child because the child had been assigned to a school where a

predominant majority is white. The board is called before the Court to explain its action and in all candor the board says "Yes, we granted that transfer for racial reasons". Thus, the Association argues that the board has operated its school system on the basis of race. Of course the Board could say "Oh, no, we granted that transfer along the lines suggested by the Solicitor General", but that simply would not be true.

Since the transfer application was approved, at the parent's request, on the basis of race, the board is subject to being cited for contempt for violating its injunction. This contempt might be purged by returning the child to a desegregated school and there the child remains — compelled to integrate — compelled by the state to attend an integrated school against his wishes and against the wishes of his parents. His constitutional rights in this sense of the word were forced upon him — not by the parent or by the child, but by the Association. Is that the meaning or the tenor of the Fourteenth Amendment? Can the Fourteenth Amendment be construed to compel a Negro child to attend a school that he does not want to attend? To attend a school that cannot educate him best? We respectfully suggest that to apply the Fourteenth Amend-

ment to gain this result does violence to Constitutional principles.

It is the position of this Board of Education that this Court should condemn compulsory integration with the same clarity and firmness that it has heretofore condemned state-imposed compulsory segregation. The compulsion of integration by the state is as obnoxious and invidious as the state's compulsion of segregation.

The rationale of petitioners' position is that the state should compel a child to attend a desegregated school if that child resides in a desegregated school zone. If this action by the state does not speed the desegregation process at a rate which petitioners feel is satisfactory, then we must assume that petitioner will next urge that boards of education should be compelled to adopt the Princeton Plan (See Solicitor General's Brief, Page 39), or some other experimental program, so that each child may have the opportunity to attend an integrated situation. Petitioners overlook the fact that school boards are primarily concerned with affording a child the best educational opportunity and sociological experimentation, though important, is a secondary consideration.

Petitioners' objective must be attributed to a desire to improve educational opportunities for all students served by the public school system. If we test this method by reasonable educational standards, we find it sadly lacking. Perhaps the outstanding authority on education in the United States is Dr. James Bryant Conant, former president of Harvard University. In his book "Slums and Suburbs, A Commentary on Schools in Metropolitan Areas" (McGraw-Hill, 1961) Dr. Conant discusses the problem which this Court and boards of education now face. We have attached to this Brief as Appendix B excerpts from Dr. Conant's book.

4. Use of the Transfer Provision During the Period of Transition.

Having recognized the skill and ability of petitioners' counsel, we must also recognize the possibility that the Court will be persuaded that it is unconstitutional for a board of education to accede to a parent's request to transfer his child when that request has as its basis the parent's desire to avoid integration, this integration having resulted from state action in making non-racial school assignments.

Recognizing that this possibility exists, we respectfully ask that the Court approve such

provision as a part of a school board's plan of desegregation pending full compliance with this Court's decision in **Brown v. Board of Education,** supra.

We have heretofore stated the use which will be made of this aspect of the plan and we trust that we have demonstrated the necessity for it. It is not a tool that will be used by boards of education to frustrate desegregation. On the contrary it is another aid to permit a school system to effect the transition without imposing undue hardship on parents or children.

CONCLUSION

These United States are populated by two predominant races — the Negro and the white. Justice Harlan has quite appropriately said in Plessy v. Ferguson, 163 U. S. 537, that the Constitution which governs these races is "... color blind, and neither knows nor tolerates classes among citizens". He said also that

> "In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such

rights. Every true man has pride of race, and under appropriate circumstances, when the rights of others, his equals under the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper ...”

Neither the Constitution, nor this Honorable Court, nor boards of education can repeal the law of nature which created and perpetuates these two races. It is a fact which exists in the minds of human beings. The Constitution directs that the state, acting through the Board of Education, must make an initial non-discriminatory assignment of students attending public schools. But, as Justice Harlan has said, the Constitution deprives no man of his pride of race and under appropriate circumstances, when the rights of others, his equals under the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper.

Shall the Court now say that this is an empty privilege — that the Fourteenth Amendment compels the State to ignore that individual's expression? We trust not.

Respectfully submitted,

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APPENDIX A

Plan of Desegregation of The Board of Education of the Memphis City Schools (Filed August 29, 1962)

I. The following procedures shall govern the operation of the school system for the school year commencing September 1, 1962:

A. A plan of school zoning or districting based upon the location of school buildings with a single geographical boundary line for each school based on the latest scholastic census will be immediately established for admission to grades 1, 2 and 3.

B. All students new to the school system in grades 1 through 3 may register in the school of their choice, even though such registration may be in a school other than that within the geographical boundaries referred to above. Assignments will then be made by the Board of Education on the basis of the geographical boundaries described in Section A. However, if the school chosen by the students new to

the system in grades 1 to 3 is not within the school zone of the residence of the student but said school has sufficient facilities for caring for the students so enrolled, the Board of Education may at its option assign such students to the school chosen by the students. Any parents dissatisfied with assignments made by the Board of Education may make application for transfer. Such applications shall be processed under the pupil assignment law.

C. All Negro pupils who elected to attend desegregated schools last year may remain in the desegregated schools which they have previously attended.

D. The transfer applications made by second and third grade Negro pupils in the current school year to attend open schools heretofore attended predominantly by white students shall be approved.

E. The assignment of all other pupils in the school system made in June, 1962, for the school year 1962-63, together with such transfers as the Board of

Education has approved, including those applications described in Paragraph D. above, will be allowed to stand. At the end of the school year commencing September, 1962, assignments of pupils in grades 1 through 4 for the school year commencing September, 1963, will be made in accordance with single geographical school zone lines established for each school.

II. For the school year beginning September 1, 1963, Grades 1, 2, 3 and 4 of all elementary schools in the Memphis Public School System shall be desegregated by the establishment of single school zone lines for said grades in each elementary school. Each year thereafter an additional grade in all schools shall be desegregated. As successive grades are desegregated, non-racial school zone lines will apply to all grades which are desegregated.

III. A plan of school zoning or districting based upon location of school buildings and the latest scholastic census will be established for the admission and assignment of students in grades 1, 2, 3 and 4 effective before the end of the school

year beginning September, 1962. As successive grades are desegregated such non-racial zone lines shall be created or extended for the successive grades. Said single school attendance areas shall be on a geographic basis according to the capacity and facilities of the buildings and other factors important to the efficient operation of a public school system. Each pupil residing within the zone shall be assigned to and shall have the right to attend the school within his zone so that attendance areas based on race shall be eliminated. The Board of Education retains the right to modify or change such school zone lines in order to make economical use of its facilities.

IV. For the school year commencing September, 1963, each student entering grades 1 through 4 and the remaining grades in successive years will be permitted to attend the school designated for the zone in which that student resides, subject to regulations that may be necessary in particular instances. Such regulations will be based upon factors such as pupil-teacher ratio, classroom availability, and other factors not related to the race of the pupils.

V. The Pupil Assignment Law and Board of Education policies and regulations will govern pupil assignments and transfer applications but the following factors will be regarded as some of the valid conditions that may be considered to support applications for transfer:

A. When a white student would otherwise be required to attend a school previously serving colored students only.

B. When a colored student would otherwise be required to attend a school previously serving white students only.

C. When a student would otherwise be required to attend a school where the majority of students in that school or in his or her grade are of a different race.

VI. In instances of patent need for a particular course of study, the Board of Education may entertain applications for transfer under the Pupil Assignment Law for students in grades other than those grades which are desegregated under this plan of desegregation to the end that no

student will be denied the right to obtain the best education which that pupil is capable of attaining. The Board of Education reserves the right to accelerate this Plan of Desegregation at such time as circumstances and conditions permit.

APPENDIX B

Excerpts From "Slums And Suburbs",

A Commentary On Schools And Metropolitan Areas,

Dr. James Bryant Conant
(Page 27, et seq.)

"In concluding this chapter, I should like to turn to a thorny subject of great concern to those interested in improving Negro education. This is the question of whether or not de facto segregation, as some like to call it, is detrimental to the education of the Negro. Closely related is a second question; namely, should the school authorities endeavor to move Negro children into purely white schools in order to have as many mixed schools as possible? The issue is a very real one, and in a sense it is primarily political. At this point I must make reference to the Supreme Court decisions of 1954 and 1955 because of a tendency to regard them not only as the law of the land but as a sacred text on education. Clearly even a unanimous opinion of the Supreme Court fails to determine educational policy except within the framework set by the issues before the Court — in this case, the "segregation of children in public schools solely on the basis of race." It is necessary to point

out this obvious fact, for I have heard the statement made that because the Supreme Court expressed the opinion that "Separate educational facilities are inherently unequal," all completely Negro schools are morally wrong and that there is essentially no difference between de jure segregation still found in almost all Southern communities (1961) and what some call de facto segregation in portions of the large Northern cities. The point is important and deserves discussion.

If one turns to the Supreme Court decision in the case of Brown et al. v. Board of Education of Topeka (347 U. S. 483 (1954), one finds the sentence I have just quoted about separate educational facilities. Taken out of context, the conclusion might be drawn that the justices declared separate educational facilities for whatever reason provided are morally wrong and if supported by tax funds are illegal. Yet on reading carefully the whole opinion, I think the key sentence is the question defined by the Court: "Does segregation of children in public schools **solely** on the basis of race, even though the physical facilities and other 'tangible' factors may be equal, deprive the children of the minority group of equal educational opportunities? We believe that it does." I have emphasized the word

"solely", as I presume to think it is the essential word. The justices appear to have expressed no view as to whether the pupils in a completely Negro school are deprived of equal educational opportunity if they are not assigned solely because of their race. In short, if one group of children is separated from another group because of the neighborhood in which they live, the fact of this separation is, of and by itself, no evidence of an inequality in education. Whether in fact the facilities and instruction are equal in a 100 per cent white school, a mixed school, and a 100 per cent Negro school in a large city is to be determined by examining the schools, not by appeal to phrases such as de facto segregation with the implication that it is to be condemned by all right-thinking people who condemn de jure segregation.

In some cities, political leaders have attempted to put pressure on the school authorities to have Negro children attend essentially white schools. In my judgment the cities in which the authorities have yielded to this pressure are on the wrong track. Those which have not done so, like Chicago, are more likely to make progress in improving Negro education. It is my belief that satisfactory education can be provided in an all-Negro school

through the expenditure of more money for needed staff and facilities. Moreover, I believe that any sense of inferiority among the pupils caused by the absence of white children can be largely if not wholly eliminated in two ways: first, in all cities there will be at least some schools that are in fact mixed because of the nature of the neighborhood they serve; second, throughout the city there ought to be an integrated staff of white and Negro teachers and administrators.

To insist that such solutions cannot be acceptable and to assume instead that the schooling of Negroes can be satisfactory only if in each schoolroom there are present some white children is to take an extremely defeatist view of Negro education in the large cities. The proposal to move any appreciable number of white children by bus into what are now Negro schools or to move all the Negro children in a Negro neighborhood into what are now white schools presents a transportation problem that is quite insoluble. An examination of the geography of the Negro and white sections of the large cities makes this evident. If some children are to be transported, the question arises which children and how many. I am not discussing here what seems to me to be a separate question; namely, the crossing

of school attendance lines when waves of population movement create overcrowded conditions in one attendance area and vacancies in another. Nor am I justifying the gerrymandering of attendance lines; such a procedure amounts to separating pupils **solely** on the basis of race.

At the elementary school level the issue seems clear. To send young children day after day to distant schools by bus seems out of the question. It must be remembered that unless by the accident of population migration there are empty seats in the predominantly white schools, white children would have to be transported to negro areas in order to free the necessary space. Clearly a complicated arrangement for moving large groups of young children around a city for the sake of mixing all the elementary schools is hardly worth discussing. At the high school level, the youth are certainly old enough to commute; one complication present in the elementary schools has disappeared. Still, a great network of transportation would have to be provided in a number of cities if the goal were to have every high school a mixed school. I have already noted the problem of determining the proper degree of admixture of white and Negro children . . . .

Much as I admire the comprehensive high school in the town with one high school and see it as an instrument of democracy, it seems impossible for school authorities in a large city to create artificially a series of such schools. If a policy were to be adopted that, as an ideal, every neighborhood school should have a widely heterogeneous school population represented by all socio-economic backgrounds, school administrators would be forced to move children about as though they were pawns on a chessboard.

If good schools can exist only with a heterogeneous student population, one could argue just as logically that state authorities should adjust all school district lines so that the high-income surburban high school would include students from a neighboring depressed area. Another impossible proposal. Antithetical to our free society as I believe de jure segregation to be, I think it would be far better for those who are agitating for the deliberate mixing of children to accept de facto segregated schools as a consequence of a present housing situation and to work for the improvement of slum schools whether Negro or white. The problems in these schools are far more difficult to solve than in other schools, larger and better staffs should be available, more money

is required. It is my firm belief that actions based on the premises I have outlined are in the best interests of the Negro and of the nation." . . . .